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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SAINT JOVITE YOUNGBLOODE, Defendant and Appellant.	B165134 (Los Angeles County Super. Ct. No. BA223317)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

Ronald B. Talkov for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Sainte Jovite Youngbloode guilty of one count of insurance fraud in violation of Penal Code[1] section 550, subdivision (a), one count of insurance fraud in violation of section 550, subdivision (a)(4), and one count of arson in violation of section 451, subdivision (d). ~(CT 149-151.)~ The trial court imposed a sentence of probation, community service, and $54,528.42 in restitution payable to State Farm Insurance (State Farm). ~(CT 591-593.)~ On appeal, defendant seeks reversal on the grounds of ineffective assistance of counsel due to attorney conflict of interest, and prosecutorial misconduct. ~(AOB 1.)~ We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

FACTS

State Farm provided insurance coverage for defendant's home and automobiles. In June 2000, defendant sought additional automobile coverage from State Farm for a vintage sports car, a 1966 Corvette, he purchased over the telephone from an Indiana dealer. After the Corvette arrived, defendant asked State Farm to insure the vehicle at the stated value of $40,000. However, because defendant did not produce the required appraisal and photographs of the vehicle, State Farm never issued the stated value policy.

On a cool and windless night in September 2000, defendant's Corvette was destroyed by fire off a desolate portion of Mulholland Highway in Malibu Canyon. The whole vehicle was ablaze, with flames spreading from the passenger compartment to the front and rear. Firefighters found the fire suspicious because of the late hour, location, vehicle type, and absence of anyone at the scene. Moreover, the burnt automobile had no license plates or readable vehicle identification number (VIN). A VIN expert later identified the vehicle as defendant's Corvette. After the Corvette was released from an impound facility to State Farm, it was kept in a secure yard but not held for evidentiary purposes.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

After the vehicle fire, defendant filed police and insurance reports. On the evening of the incident, defendant claimed he had parked the Corvette in the parking lot of a Van Nuys shopping center, where he spent hours playing video games and watching a movie alone. He told investigators he had locked the Corvette and taken the only set of keys. The Corvette had no anti-theft device. After returning to the parking lot at midnight, defendant found his vehicle missing and immediately contacted the mall security to request the surveillance film, but none was available because some cameras were broken.

Defendant asserted his Corvette was a restored, near "show quality" car with only 17,800 miles on the odometer. He alleged he paid between $33,000 to $34,000 for the Corvette, including a $10,800 down payment paid in part with a money order purchased at 7-Eleven. After allegedly paying for significant restoration, defendant estimated the vehicle's actual value to be between $42,000 and $50,000. Defendant further claimed the additional loss of $7,250 in personal property left in the Corvette, including a laptop computer, DVD player, DVDs, and designer sunglasses. However, defendant never provided receipts or documentation of his down payment, money order, repairs, restoration, or personal property. For the relevant time period, there were no 7-Eleven records showing defendant had purchased a money order.

Because State Farm found the circumstances surrounding the stolen vehicle suspicious, the claim was assigned to its special investigation unit which retained a cause and origin expert, a forced entry expert, and a forensic locksmith. The investigation established the fire was incendiary, started by igniting gasoline in the front passenger compartment. Hot wiring was eliminated as the means for stealing the vehicle. Recovered from a molten mass inside the burnt Corvette, a vintage key matching both the ignition and door locks was found in the ignition. The ignition wafers further showed no evidence of having been damaged by being started with a different key or instrument. In addition, the keys defendant produced as his only set did not fit the Corvette's ignition. ~

Defendant's forensic analyst and locksmith viewed the videotape of the dismantling of the ignition by State Farm's forensic locksmith. From the videotape, they concluded keys other than the original ignition key could have operated the vehicle. Because the videotape was unclear and the dismantling work was at times obscured, defendant's experts concluded that the methodology was flawed and the evidence may have been altered.

Three days after the Corvette's fire, defendant signed a lease agreement for a $46,728 Jaguar. Defendant's $3,000 check for the down payment was returned for insufficient funds. At the time of trial, defendant had not paid the full obligation.

State Farm paid defendant $5,484.44 as reimbursement for the loss of personal property from his homeowner's policy. State Farm also paid the lienholder $24,640.02 and obtained the certificate of title to the Corvette. The recorded odometer mileage was 117,215.

PROCEDURE

Defendant initially retained attorney J. Patrick Maginnis (Maginnis) to represent him in this case. From December 12, 2001, to February 4, 2002, Maginnis appeared on behalf of defendant in preliminary hearing and pretrial proceedings before the trial court.

On March 12, 2002, defendant advised the court that Maginnis had suddenly retired from practice and could no longer represent him. The court verified on the State Bar of California Web site that Maginnis was no longer licensed to practice law in California. The court granted defendant time to seek new counsel.

On March 26, 2002, attorney Robert Sheahen (Sheahen) substituted as defendant's counsel. Sheahen represented defendant throughout the jury trial. On October 4, 2002, the jury found defendant guilty.

On November 22, 2002, defendant advised the court he wanted to replace Sheahen with Ronald Tolkov (Tolkov) as counsel for post-trial motions and the sentencing hearing. Defendant stated Sheahen was "tied up" in another trial and Tolkov's

substitution would be in defendant's best interest. On December 20, 2002, the trial court imposed a sentence of probation, community service, and $54,528.42 in restitution payable to State Farm.

Starting on December 23, 2002, and for the duration of the proceedings, Sheahen appeared as counsel for Maginnis in the matter of *People v. Maginnis* (Super. Ct. L.A. County, 2003, No. BA240845). On June 10, 2003, Maginnis pled no contest to two counts of grand theft under section 487, subdivision (a).

On February 13, 2003, defendant appealed.

DISCUSSION

INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON CONFLICT OF INTEREST

Defendant contends that trial counsel Sheahen had a disabling conflict of interest because he represented pretrial counsel Maginnis at a later proceeding. Defendant asserts, without supporting evidence in the record, that Sheahen is "a long time friend" of Maginnis's; that Sheahen undertook Maginnis's representation while representing defendant; and that such representation contravened a specific provision in the retainer agreement between defendant and Sheahen. Defendant further argues that he had potential claims against Maginnis arising from his representation during the preliminary stages of the prosecution. Defendant did not object on the grounds of attorney conflict of interest at trial.

The record shows that Sheahen was replaced by Tolkov as defendant's counsel at the sentencing hearing on November 22, 2002. On the record before us, Sheahen did not make his first appearance as Maginnis's counsel in a separate proceeding until December 23, 2002. (*People v. Maginnis* (Super. Ct. L.A. County, *supra*, No. BA240845).) Thus, defendant has established only that he was Sheahen's former client when Sheahen commenced his representation of Maginnis.

Federal and state constitutional rights to the effective assistance of counsel include the right to representation free from conflicts of interest. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Bonin* (1989) 47 Cal.3d 808, 833-834.) A conflict arises in any situation in which an attorney's responsibilities to one client or a third person threaten his loyalty to or efforts on behalf of another client. (*People v. Jones* (1991) 53 Cal.3d 1115, 1134; *Bonin*, *supra*, at p. 835.)

Under the Rules of Professional Conduct, an attorney must avoid the representation of adverse interests. (Rules Prof. Conduct, rule 3-310.) An attorney may not, "without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." (Rules Prof. Conduct, rule 3-310(E).) This provision is intended to protect the confidences of another present or former client. (Discussion to Rules Prof. Conduct, Rule 3-310.)

To show adverse interests in successive representation, "it is well settled actual possession of confidential information need not be proved. . . . It is enough to show a 'substantial relationship' between the former and current representation." (*H. F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 1452, citing *Global Van Lines, Inc. v. Superior* Court (1983) 144 Cal.App.3d 483, 489.) If the former client can establish the existence of a substantial relationship between representations, the courts will conclusively presume the attorney possesses confidential information adverse to the former client. (*River West, Inc. v. Nickel (*1987) 188 Cal.App.3d 1297*,* 1303.)

Here, no facts in the record demonstrate whether Sheahen's representation of Maginnis in the grand theft case was substantially related to the representation of defendant in the insurance fraud case. In fact, there are no facts in the record to show any relationship between the two cases. Therefore, defendant has not met the requisite showing that Sheahen was representing adverse interests in his successive representation of defendant and Maginnis.

However, a defendant who fails to object at trial "need only demonstrate a *potential* conflict, so long as the record supports an 'informed speculation' that the asserted conflict adversely affected counsel's performance. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 998.) Nonetheless, "'[s]peculative contentions of conflict of interest cannot justify disqualification of counsel.' [Citation.]" (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 582.) For purposes of this analysis, we assume, without deciding, that a potential conflict of interest could be established, and inquire as to prejudice.

"In undertaking such an inquiry, we are . . . bound by the record. But where a conflict of interest causes an attorney *not* to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. [Citation.]" (*People v. Cox* (2003) 30 Cal.4th 916, 949.) Convictions are reversible on the grounds of inadequate assistance of counsel only when the record affirmatively reveals that counsel had no rational tactical purpose for any allegedly incompetent act or omission. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) The defendant must demonstrate that the conflict of interest prejudicially affected his counsel's representation. (*People v. Clark* (1993) 5 Cal.4th 950, 995.) We review each of the alleged instances of ineffective assistance of counsel.

1. Physical Inspection of the Evidence

Defendant alleges Sheahen failed to arrange for defendant's forensic analyst and locksmith to inspect crucial physical evidence–the ignition key, ignition lock and door lock from the burnt Corvette. Instead, experts for the defense formulated their opinions by viewing photographs and a videotape showing the removal of the key and dismantling of the locks. Defendant argues the omission of physical inspection invited the

prosecution to attack the testimony of defendant's expert witnesses and the court to comment on defense experts' weak testimony.

The record shows the ignition lock and key were recovered in a molten mass from the burnt Corvette. The driver-side door lock was melted as a result of the fire and could not be physically tested. The ignition lock lodged in the molten mass was necessarily cut apart to access the ignition key and lock wafers. Once disassembled, the original ignition could not be put back together to test the key. However, State Farm's locksmith decoded the matching measurements of the ignition key and wafers. Defendant's experts physically examined the ignition key at trial.

The videotape reviewed by defense experts recorded the removal of the ignition key and the dismantling of the lock wafers. At issue was whether that key was removed from the ignition and whether any mishandling of evidence occurred. As defendant's vehicle component analyst testified, inspection of the physical evidence after dismantling would not have determined the answer to that question. In any event, from viewing the videotape and photographs, defendant's experts were able to form the opinion that the methodology for dismantling the ignition key and wafers was flawed.

Because the fire destroyed lock components and the ignition was already disassembled, physical inspection of the dismantling methodology was not feasible. Viewing the videotape and photographs of the ignition lock being dismantled was an appropriate substitute for physical inspection. An attorney without a conflict of interest could not have acted differently. Had physical inspection of the destroyed components been possible, it is unlikely that defendant would have garnered any real tactical advantage in discovering cumulative evidence of flaws in the dismantling procedure. To the contrary, because the videotape of the procedure was partially obscured, defendant's experts had the added advantage of finding fault with both the dismantling procedure and its recording. Accordingly, under the *Cox* analysis, Sheahen did not provide ineffective assistance of counsel in this regard.

2. Impeachment of Expert's Prior Testimony

Defendant argues Sheahen failed to prepare for the impeachment of his expert through prior testimony.

At trial, the prosecution cross-examined defendant's forensic analyst using transcripts of testimony he offered in other cases. The prosecution questioned defendant's forensic analyst about prior testimony in another matter in which he represented an insurance company. There, the forensic analyst criticized the opposing expert's application of radiant heat in disassembling a lock, but agreed with the conclusion that the insured's key was the last key used. The introduction of this prior testimony demonstrated the forensic analyst had previously testified for insurance companies and disagreed with other experts. It did not, however, impeach the forensic analyst's testimony in the instant case.

Sheahen asked the court whether he was entitled to the same information, to which the court replied that a defense expert's prior testimony was equally available to both parties. Sheahen could point to no authority entitling him to the same information. And, while better practice would indicate that counsel ordinarily should investigate prior testimony before presenting an expert, defendant has cited no authority requiring Sheahen to be familiar with the prior testimony of his expert in other cases.

In any event, defendant was not prejudiced by the prosecution's use of the forensic expert's prior testimony in another matter. Neither did defendant lose any tactical advantage by Sheahen's unfamiliarity with the expert's prior testimony in another case, because the evidence served to establish the expert's evenhandedness. Thus, ineffective assistance of counsel was not shown in this instance.

3. *Exclusion of Witnesses*

Defendant asserts Sheahen's delay in informing the prosecution of potential witnesses led to the exclusion of 11 witnesses whose testimony would have led to a more favorable result for defendant.

The record shows Sheahen provided the court and prosecution with a list of potential witnesses immediately prior to the commencement of testimony. The court ordered the parties to confer and determine which witnesses had been disclosed earlier, and announced it would exclude witnesses as to whom there was late notification, absent some justification. Nothing in the record discloses the parties' resolution regarding these witnesses. Nor does the record show any offer of proof of the proposed testimony of the excluded witnesses. The forensic analyst and locksmith were the only witnesses who testified on defendant's behalf.

"It is a fundamental rule of procedure that an appellant must make an affirmative showing of error by an adequate record." (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 72; see also *In re Kathy P.* (1979) 25 Cal.3d 91, 102-103.) "Appellant must affirmatively show error by an adequate record; error is never presumed." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) The presumption by an appellate court is that the judgment appealed from is correct (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564), and any uncertainty in the factual record is resolved against appellant (*People v. Green* (1979) 95 Cal.App.3d 991, 1001).

"A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

The facts in the record do not support defendant's claim that Sheahen meant to "gut" defendant's case. Defendant speculates the 11 excluded witnesses "might have shed light on [defendant] as a likable person, not capable of the crimes for which he was charged, and provide [him] with other exculpatory evidence." With no facts in the record to establish the roles and expected testimonies of the excluded witnesses, their potential impact on changing the outcome of defendant's trial is unknown. Because the identification of defendant's key to the Corvette is the crux of the case, Sheahen may have tactically chosen to put on only the two expert witnesses for this reason.

Accordingly, we must presume defendant's attorney, as a tactical matter, elected not to put on the excluded witnesses. For these reasons, we find no ineffective assistance of counsel here.

4. Failure to Object

Without a specific citation to the record, defendant argues Sheahen failed to object to the prosecutor's leading question to Thomas Lepper (Lepper), a forensic consultant who served as the prosecution's expert witness. Defendant also alleges Sheahen failed to object to several misstatements of the evidence in the prosecutor's closing argument.

The record demonstrates that Sheahen made vigorous objections throughout the trial. For example, in the prosecution's 47 pages of direct and redirect examinations of Lepper, Sheahen objected 15 times: six times for leading questions; five times on the grounds of testimony falling outside the witness's expertise; once for lack of foundation; once for non-responsive answer; once for hearsay; and once for relevance. The court sustained two of these objections. Because Sheahen already raised objections six times to leading questions by the prosecutor, the one unspecified instance in which he failed to do so may indicate the objection had already been raised.

Prior to closing arguments, the trial court instructed the jury on CALJIC No. 1.02 that "[s]tatements made by the attorneys during the trial are not evidence." The court further explained to the jury: "Now we'll turn to the closing argument. [¶] This is the opportunity for the lawyers to talk with you about everything that you heard in the case. This is the most broad-ranging part of the trial. [¶] The lawyers can talk with you about the evidence, the witnesses. They can talk with you about the instructions, and they can also make comments to illustrate their points based upon things of general knowledge, not to bring the evidence of some other fact, but to illustrate their points about this case. [¶] If the lawyers say something about the evidence that you disagree with, it doesn't mean that they're right and you're wrong. You should make up your own mind about the evidence in this case."

‘“‘[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ [Citation.] ‘A prosecutor may “vigorously argue his case and is not limited to ‘Chesterfieldian politeness’” [citation], and he may “use appropriate epithets . . . .”’” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

In the instant case, defendant alleges that Sheahen failed to object to the prosecutor’s remarks on her closing and rebuttal arguments. First, defendant argues the prosecutor misstated the evidence that her locksmith expert was “a technical editor for a rather prodigious locksmith magazine.” In his testimony, the locksmith stated he was the technology editor of Locksmith Leger International magazine, had been employed since 1983, and the magazine had a worldwide subscription. The prosecutor’s characterization of the locksmith editorial role and the magazine’s prodigious reputation was, therefore, consistent with the testimony provided.

Second, defendant asserts the prosecutor misstated the prosecution’s expert testimony by arguing that the ignition lock was in the dashboard at the time of the fire. The locksmith had testified that the ignition was found on the floorboard on the driver’s side under the ignition. Under the meaning of *Hill*, the prosecution may draw such a reasonable conclusion based on the evidence presented. (*People v. Hill, supra,* 17 Cal.4th at p. 819.)

Third, defendant contends the prosecutor mischaracterized the qualification of defendant’s forensic analyst by referencing a Kentucky court’s refusal to have him testify as an expert in that case. The record shows the Kentucky court allowed that witness to testify only as an automotive forensic examiner and not as a forensic locksmith expert. Accordingly, the prosecutor’s comments, while broad, were not a significant mischaracterization of the expert’s credentials as a locksmith.

In response to the prosecution's closing and rebuttal arguments, Sheahen objected on four occasions to: (1) the line of argument that defendant intended to defraud State Farm; (2) the statement inferring the investigator believed there was sufficient evidence to file a criminal complaint; (3) comments suggesting impropriety by defense experts in reaching their conclusions; and (4) attack on the defense's opening statement.

Applying *Cox* to the instant facts, the claimed failure of defense counsel to object does not differ from the expected strategy of counsel who did not have a conflict of interest. Because Sheahen had in fact made numerous objections during the expert's testimony and the prosecution's closing statement, there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. For these reasons, we find no ineffective assistance of counsel based on conflict of interest.

PROSECUTORIAL MISCONDUCT

Defendant asserts the prosecutor committed misconduct by making personal attacks on the integrity of opposing counsel and by misstating the ruling of a Kentucky court from another trial. As we have already discussed in the preceding section, the comments of the prosecutor on the Kentucky court's ruling were not clearly improper arguments based on the record.

As to attacks on the defense's opening statement, the prosecutor stated in her closing statement: "There have been a lot of untruths here. . . . In Mr. Sheahen's opening statement, he made a lot of statements for which there has been no evidence produced. And what's worse, in his opening statement he made statements for which we know that those statements are not true now." The alleged "untruths" included promised evidence that the Corvette was stolen by joyriders and found a few days later. Such evidence was never produced by the defense.

Sheahen objected to the prosecutor's attack on the opening statement. In response, the court explained to the jury and admonished the attorneys that counsel could "comment on things that were not proven and may have been referenced in the opening

statement, but I don't think we should parse through the specific things that were mentioned."

Prosecutorial misconduct consists of conduct which infects a trial with such unfairness as to deny a defendant due process of law, or the use of deceptive or reprehensible methods to persuade the jury. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) There may be prosecutorial misconduct even in the absence of intent or bad faith. (*Hill, supra*, at pp. 822-823.) However, reversal for prosecutorial misconduct is not necessary unless defendant has been prejudiced thereby; i.e., unless it is reasonably probable defendant would have obtained a more favorable result absent the misconduct. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) In the instant case, zealous commentary on the absence of evidence promised in the defense's opening statement and a Kentucky court's exclusion of a witness as an expert did not prejudice defendant. It is unlikely that a different verdict would have resulted even without those comments. Therefore, any error that might have resulted would be in any event harmless.

DISPOSITION

The judgment of the superior court is affirmed.

ZELON, J.

We concur:

JOHNSON, Acting P. J. WOODS, J.